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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SANDRA TURNER, ET AL.

PETITIONERS

v.

LINDA MCMAHON, OTIS R. BOWEN, ET AL.

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA TURNER, DEBRA SCRUGGS, and JERRYLEAN BAKER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California; DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; JESSE HUFF, individually and in his official capacity as Director of the Department of Finance of the State of California; and the DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA; Defendants/Third-Party Plaintiffs-Appellants, v. OTIS R. BOWEN, Secretary of Health and Human Services, Third-Party Defendant.	No. 86-2321 D.C. No. CV-81-4457-TEH

SANDRA TURNER; DEBRA SCRUGGS; JERRYLEAN BAKER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellees,	)	
v.	)	
OTIS R. BOWEN, Secretary of Health and Human Services,	)	No. 86-2490 D.C. No. CV-81-4457-TEH
Third-party-Defendant-Appellant,	)	
v.	)	
LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California,	)	
Defendant-third-party-Plaintiff.	)	

SANDRA TURNER, DEBRA SCRUGGS, and JERRYLEAN BAKER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. OTIS R. BOWEN, Secretary of Health and Human Services, Third-Party Defendant, and LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California; JESSE HUFF, individually and in his official capacity as Director of the Department of Finance of the State of California; and the DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA, Defendant-third-party-Plaintiff-Appellant.	No. 87-1519 D.C. No. CV-81-4457-TEH OPINION

Argued and Submitted
September 16, 1987
San Francisco, California

Filed October 16, 1987

Before: Herbert Y.C. Choy, Arthur L. Alarcon and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Alarcon

Appeal from the United States District Court from the Northern District of California (San Francisco)
Thelton E. Henderson, District Judge, Presiding

SUMMARY

Administrative Law

Appeal from judgment. Reversed in part, vacated in part.

In this class action by appellee AFDC recipients, the issue is whether the appellant State should, when calculating AFDC eligibility and benefits, base its calculations on the gross or net income of a working recipient after mandatory payroll deductions. The district court issued a permanent injunction enjoining it from implementing its new regulations and ordered the State not to treat funds withheld for mandatory payroll deductions as income to AFDC recipients. The injunction was stayed. The Secretary then ordered states participating in the AFDC program to recover overpayments made to

AFDC recipients where mandatory payroll deductions had been disregarded in calculating benefits and eligibility. Appellees had their AFDC benefits calculated without treating mandatory payroll deductions as income during the period when the permanent injunction was implemented and when the stay was issued. The State then initiated measures for recoupment of the AFDC monies paid during this period under 42 U.S.C. §602(a)(22). Appellees thereafter filed a supplemental complaint in federal court to prohibit any recoupment by the State of AFDC benefits as overpayments paid pursuant to the court's injunction. The district court granted the appellees' motion for summary judgment and request for an injunction. The State was enjoined from recouping funds that were paid to AFDC recipients in California from the date the district court issued its permanent injunction until the date the Secretary's request for a stay of the

district court's injunction. The district court examined the legislative history of section 602(a)(22) and concluded that recoupment of overpayments was designed solely to correct overpayments resulting from recipient or agency error. The court also rejected the State's argument that it had a common law right to recoupment. The district court enjoined the State from recouping AFDC overpayments and the Secretary from taking any action declaring the State to be in violation of federal law.

[1] The plain language of section 602(a)(22) mandating recovery of any overpayment does not distinguish between classes of overpayments that may be recouped. [2] This court has examined the legislative history for the sole purpose of determining whether there is a clearly expressed intention to exclude recoupment of overpayments made pursuant to a court order. There is none. [3] This court will

consider appellants' argument concerning the statute's constitutionality raised on appeal even though not raised below because the issue of appeal is purely one of law that is both central to the case and important to the public. [4] California has a statutory scheme which permits current AFDC recipients to obtain an administrative hearing and judicial review of a determination made concerning overpayments. Thus, appellees' argument that section 602(a)(22) is unconstitutional as applied is without merit. [5] A state may seek recovery of an overpayment under its common law right of restitution or by filing an action under state law pursuant to section 602(a)(22). [6] Because the judgment on the merits must be reversed, appellees are no longer a prevailing party and the award of attorney's fees must be vacated.

COUNSEL

Mark N. Aaronson and Richard A. Rothschild, San Francisco, California, for the plaintiffs-appellees.

Richard A. Olderman, Department of Justice, Washington D.C. and John J. Klee, Jr., Deputy Attorney General, San Francisco, California, for the defendants/third-party plaintiffs-appellants.

OPINION

ALARCON, Circuit Judge:

The dispositive issue on appeal is whether section 402(a) of the Social Security Act, 42 U.S.C. §602(a)(22) (Supp. III 1985) permits a state to recoup overpayment of money paid to Families with Dependent Children (hereinafter AFDC) recipients under compulsion of an erroneous court order subsequently reversed by the Supreme Court. We hold that a state is authorized to do so under the plain

language of the statute, and reverse the judgment of the district court.

Defendants-appellants Linda McMahon, Director of the Department of Social Services of the State of California (hereinafter State) and third party defendant-appellant Otis R. Bowen, Secretary of Health and Human Services (hereinafter Secretary or collectively referred to as appellants) appeal from the district court's orders granting plaintiffs-appellees Sandra Turner and other certified class members (hereinafter appellees) injunctive relief, summary judgment, and attorney's fees. In this consolidated appeal, appellees are past, present and future AFDC recipients who have been or will be affected by appellants' policy of considering mandatory payroll deductions as income in calculating grants and determining eligibility.

FACTS

A. Background

In 1981, a class of AFDC recipients in California brought suit in federal court asserting that the State had improperly calculated the amount of benefits due AFDC recipients who work in implementing directions issued by the Secretary. The primary issue raised was whether the State should, when calculating AFDC eligibility and benefits, base its calculations on the gross or net income of a working recipient after mandatory payroll deductions.

In 1982, the district court issued a permanent injunction which enjoined it from implementing its new regulations and ordered the State not to treat funds withheld for mandatory payroll deductions as income to AFDC recipients. Turner v. Woods, 559 F.Supp. 603 (N.D. Cal. 1982). We affirmed the district court's order. Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983).

The injunction was stayed by Justice Rehnquist, acting as Circuit Justice for

the Ninth Circuit. Heckler v. Turner, 468 U.S. 1305 (1984) (in chambers). The Supreme Court, in a unanimous decision, reversed this court's judgment. Heckler v. Turner, 470 U.S. 184 (1985).

The Secretary thereafter issued Action Transmittal No. SSA-AT-85-10 on April 30, 1985. The Action Transmittal ordered states participating in the AFDC program, including California, to recover overpayments made to AFDC recipients where mandatory payroll deductions had been disregarded in calculating benefits and eligibility. The appellees had their AFDC benefits calculated without treating mandatory payroll deductions as income during the period between July 29, 1982, when the permanent injunction was implemented, and August 10, 1984, when the stay was issued by Justice Rehnquist.

The State then initiated measures for recoupment of the AFDC monies paid during this period under 42 U.S.C. §602(a)(22).

Section 602(a)(22) provides in pertinent part:

> A State plan for aid and services to needy families with children must--
>
> . . .
>
> (22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan, and, in the case of--
>
> > (A) an overpayment to an individual who is a current recipient of such aid (including a current recipient whose overpayment occurred during a prior period of eligibility), recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member, except that such recovery shall not result in the reduction of aid payable for any month, such that the aid, when added to such family's liquid resources and to its income (without application of paragraph (8)), is less than 90 percent of the amount payable under the State plan to a family of the same composition with no other income (and, in the case of an individual to whom

> no payment is made for a month solely by reason of recovery of an overpayment, such individual shall be deemed to be a recipient of aid for such month);
>
> (B) an overpayment to any individual who is no longer receiving aid under the plan, recovery shall be made by appropriate action under State law against the income or resources of the individual or the family;....

B. Nos. 86-2321, 86-1490

Appellees thereafter filed a supplemental complaint in federal court to prohibit any recoupment by the State of AFDC benefits as "overpayments" paid pursuant to the court's injunction. Appellees argued that monies paid to AFDC recipients pursuant to a court order were not "overpayments" within the meaning of section 602(a)(22). The State asserted that under section 602(a)(22) and the common law, overpayments made under a subsequently overturned court order could be recovered. The State filed a third

party complaint against the Secretary claiming that if the State was enjoined from recovering overpayments, the Secretary should be prohibited from imposing sanctions for failure to comply with the recoupment provisions of section 602(a)(22).

The parties filed cross-motions for summary judgement. On June 18, 1986, the district court granted the appellees' motion for summary judgment and request for an injunction. The State was enjoined from recouping funds that were paid to AFDC recipients in California from July 29, 1982, the date the district court issued its permanent injunction, until August 10, 1984, the date Justice Rehnquist granted the Secretary's request for a stay of the district court's injunction.

The district court examined the legislative history of section 602(a)(22) and concluded that recoupment of overpayments was designed solely to correct

overpayments resulting "from recipient or agency error." The court reasoned that "[n]othing in this legislative history suggests Congress intended to require states to recover funds paid pursuant to a court-ordered injunction." Thus, "[i]n the absence of any error or lack of diligence by either plaintiffs or the state, the OBRA amendments do not require--or empower--the state to recover the funds paid under the injunction." The court also rejected the State's argument that it had a common law right to recoupment.

The district court enjoined the State from recouping AFDC overpayments and the Secretary from taking any action declaring the State to be in violation of federal law.

C. No. 87-1519

No. 87-1519 is a related appeal challenging the award of attorney's fees to appellees under 42 U.S.C. §1988 as prevailing parties on the recoupment issue.

This appeal was consolidated with the appeals nos. 86-2321 and 86-2490.

Appellees sought $35,252 in attorney's fees against the State. The State contended the appellees were not entitled to fees, and alternatively, the fees they claimed were excessive. The court determined that the hourly rate and the number of hours claimed were reasonable for work performed on the merits. The district court reduced the number of hours in its award for time spent on the fee issue. The district court awarded appellees' counsel San Francisco Lawyers' Committee for Urban Affairs $18,161 and counsel Western Center on Law and Poverty $14,990, totalling $33,781.

DISCUSSION

APPEALS NOS. 86-2321, 86-2490

I. RECOUPMENT OF AFDC FUNDS

Appellants contend that 42 U.S.C. §602(a)(22) clearly and unambiguously requires the State to recover overpayments

made to AFDC recipients. Alternatively, the Secretary contends that he is entitled to a common law right to recoupment of the AFDC overpayments.

A. Standard of Review

A district court's grant of summary judgment is reviewed de novo. Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, No. 86-6182, slip op. at 8 (9th Cir. Sept. 3, 1987). In this case, the parties agree that there are no genuine issues of fact in dispute. Therefore, "this Court need only decide whether the substantive law was properly applied." Id. The district court's construction of a statute is subject to de novo review. Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 824 F.2d 710, 717 (9th Cir. 1987).

B. The Plain Meaning of 42 U.S.C. §602(a)(22)

A court's objective when interpreting

a federal statute " 'is to ascertain the intent of Congress and to give effect to legislative will.'" Foxgord v. Hischemoeller, 820 F.2d 1030, 1032 (9th Cir. 1987) (quoting United States v. Taylor, 802 F.2d 1108, 1113 (9th Cir. 1986), cert. denied, 107 S.Ct. 1309 (1987)). "'The most persuasive evidence of . . . [congressional] intent is the words selected by Congress.'" Foxgord, 820 F.2d at 1032 (quoting Director, Office of Workers' Compensation Programs v. Forsyth Energy, Inc., 666 F.2d 1104, 1107 (7th Cir. 1981)). "We begin with the statute's language, and '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" Foxgord, 820 F.2d at 1032 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) (citations omitted).

The determinative statute is 42 U.S.C. §602(a)(22). The relevant language

provides that "the State agency will promptly take all necessary steps to correct any overpayment . . . of aid under the State plan...." 42 U.S.C. §602(a)(22) (emphasis added). The Secretary's regulation broadly defines overpayment as follows: "Overpayment means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible." 45 C.F.R. §233.20(a)(13)(i) (1986).

The district court did not expressly analyze the statute's plain meaning, but simply examined the statute's legislative history. The appellees summarily dismiss Congress' language as not clear on its face, and proceed to a discussion of the legislative history. Appellees have failed to meet their burden of pointing to any express language in the legislative history which would preclude the State from filing an action for recoupment or imposing a set

off where overpayment has been compelled by an erroneous court order. Foxgord, 820 F.2d at 1032.

[1] The plain language of section 602(a)(22) mandating recover of "any overpayment" does not distinguish between classes of overpayments that may be recouped. See Tambe v. Bowen, 662 F.Supp. 939, 941 (W.D.N.Y. 1987) ("the language of the statute [§602(a)(22)] is clear in providing that 'all' necessary steps shall be taken to correct 'any' overpayment.... This broad language is not tempered or constricted by any limitation whatsoever"). Instead, use of the adjective "any" indicates that Congress intended that overpayments must be recouped without restriction. A literal reading of the statutory language is supported by the Secretary's construction of the statute he is required to enforce. As set forth above, 45 C.F.R. §233.20(a)(13)(i) broadly defines an overpayment as money received

which exceeds the amount the individual was entitled to receive. The regulation imposes no restriction on the right of a state to recoup any overpayment. The Secretary's interpretation of a statute is entitled to great deference. Department of Health, State of Cal. v. Secretary of Health & Human Servs., 823 F. 2d 323, 326 (9th Cir. 1987); Miller v. Bowen, 789 F.2d 678, 681 (9th Cir. 1986) (we give "great deference" to the Secretary's interpretation of a statute in issuing regulations).

[2] The record shows that the State made AFDC payments to appellees during the period of the permanent injunction which exceeded the amount the appellees were entitled to receive under the AFDC program. The statute does not distinguish overpayments made as the result of a court order. Appellees have not demonstrated that Congress intended to exclude recoupment of court ordered overpayments. We have

examined the legislative history for the sole purpose of determining whether, notwithstanding the plain language of the statute, there is a clearly expressed intention to exclude recoupment of overpayments made pursuant to a court order. There is none. The district court erred in concluding that the State could not recoup AFDC payments.

II. CONSTITUTIONALITY OF THE STATUTE

Appellees also assert that if we conclude that Congress intended to permit a State to recover AFDC benefits erroneously paid pursuant to a court order, the statute would be unconstitutional as applied. Appellees claim that such an interpretation would permit a state administrative welfare agency to divest a court of its equitable powers to determine whether restitution should be ordered.

A. Failure to Raise Issue in the District Court

As a preliminary matter, we consider the Secretary's contention that appellees'

failure to challenge section 602(a)(22) on constitutional grounds in the district court precludes them from raising the issue here. We disagree.

[3] Generally, we will not consider an argument on appeal if it was not raised below. Abex Corp. v. Ski's Enterprises, Inc., 748 F.2d 513, 516 (9th Cir. 1984). We recognize an exception to this rule, however, where the issue on appeal is purely one of law that is both central to the case and important to the public. Id. Here, our consideration of the issue will not require the parties to develop new facts; this issue involves a pure question of law. Moreover, the constitutionality of section 602(a)(22) to recover AFDC monies paid to recipients presents a significant question of general impact. Under these circumstances we will exercise our discretion to consider the issue notwithstanding appellees' failure to raise it in the district court.

B. Availability of Judicial Review

The primary reason appellees contend section 602(a)(22) is unconstitutional as applied is because "[a]t no time would the state welfare agency have to pose the issue of restitution to a court." This claim is without merit.

In California, "[c]urrent and future [AFDC] grants . . . may be reduced [by the county] because of prior overpayments...." Cal. Welf. & Inst. Code §11004(c) (West Supp. 1987). Prior to effectuating any reduction of current grants to recover past overpayments, "the recipient shall be advised of the proposed reduction and of his or her entitlement to a hearing...." Id. at §11004(e). If the agency determines after a hearing that an overpayment has occurred, the county shall seek full amount of the overpayment including the amount paid while the hearing process was pending which "shall be permitted concurrently with any suit for restitution ...." Id. at

§11004(f).

Where an overpayment has been made to an individual who is no longer receiving public social services, "recovery shall be made by appropriate action under state law against the income or resources of the individual ...." Id. at §11004(i).

If the individual is dissatisfied with any action of the county department, in attempting to recoup overpayments, he may request and obtain an administrative hearing with the Department of Social Services. Id. at §10950 (West Supp. 1987). If the recipient is not satisfied with the final decision after the administrative hearing, he may file a petition for a writ of mandate seeking court review of the administrative decision under Cal. Code Civ. Proc. §1094.5, "praying for a review of the entire proceedings in the matter, upon questions of law involved in the case." Cal. Welf. & Inst. Code §10962

(West 1980).

[4] California has a statutory scheme which permits current AFDC recipients to obtain an administrative hearing and judicial review of a determination made concerning overpayments. Similarly, a former AFDC recipient is provided judicial review when the county initiates an action to collect the overpayments. Appellees' argument that section 602(a)(22) is unconstitutional as applied is without merit.

Appellees also contend that a strict interpretation of the plain language of the statute would permit Congress by implication to curtail a district court's equitable jurisdiction to fashion final relief after appellate reversal of a permanent injunction in violation of Article III of the United States Constitution. Appellees have failed to cite any authority to support this novel proposition. This argument is unpersuasive.

[5] Congress has not limited a district court's equitable jurisdiction in permitting recovery of any overpayments under section 602(a)(22). Instead, it expressly expanded the remedies available to recover an overpayment of AFDC funds. As a result of the language used by Congress, a state may seek recovery of an overpayment under its common law right of restitution, see Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 145 (1919) ("a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby"), or by filing an action under state law pursuant to section 602(a)(22). Congress has the power under Article III of the United States Constitution to fashion new remedies, see, e.g., Declaratory Judgment Act, 28 U.S.C. §§2201, 2202, or to limit the applicability of the traditional

equitable remedies available in the district court, see, e.g., Anti-Injunction Act, 29 U.S.C. §§101-115. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937) (Congress may create and improve, as well a abolish or restrict, remedies available in federal court).

APPEAL NO. 87-1519

ATTORNEY'S FEES UNDER 42 U.S.C. §1988

[6] The district court awarded attorney's fees to appellees pursuant to the Civil Right Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988. Section 1988 authorizes an award to a "prevailing party" in an action filed pursuant to under 42 U.S.C. §1983. We have concluded that the judgment on the merits must be reversed. Appellees are no longer a "prevailing party." Accordingly, the award of attorney's fees must be vacated. Ladnier v. Murray, 769 F.2d 195, 200 (4th Cir. 1985); Harris v. Pirch, 677 F.2d 681, 689 (8th Cir. 1982).

CONCLUSION

The district court's judgments in appeals nos. 86-2321 and 86-2490 is REVERSED. The judgment in 87-1519 is VACATED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SANDRA TURNER, et al.,	)	
	)	
Plaintiffs.	)	
	)	No. C 81-4457 TEH
v.	)	
	)	
LINDA MCMAHON, et al.,	)	
	)	
Defendants.	)	
	)	
	)	

ORDER GRANTING SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

This matter is before the court on cross-motions for summary judgment on plaintiff's first supplemental cause of action. Plaintiffs have also moved for injunctive relief. After considering the memoranda and oral arguments offered by both parties, the court hereby GRANTS summary judgment in favor of plaintiffs and also GRANTS injunctive relief against the state defendants and federal third-party

defendant.

Procedural History

This case has returned to this court after a ruling by the Supreme Court. In July 1982, this court entered a permanent injunction against the state defendants prohibiting them from treating mandatory payroll deductions as "income" when calculating benefit levels for AFDC recipients. After the Ninth Circuit upheld this injunction, the Supreme Court reversed and remanded to the Court of Appeals. Heckler v. Turner, ____U.S.____, 105 S.Ct. 1138 (1985). Pursuant to this remand, the Ninth Circuit reversed the original judgment of this court.

The federal government subsequently ordered the state to begin recoupment of the additional AFDC payments made under the terms of the permanent injunction. For those persons still receiving AFDC, the federal government has directed the state to reduce the recipients' monthly checks

until the state recovers the funds paid under the injunction. To recover from former recipients who no longer receive benefits, the state is apparently contemplating bringing a multitude of individual lawsuits.

In response to this plan, plaintiffs asked the court to enter either a protective order or an injunction prohibiting the state from pursuing the funds paid under the injunction. The state challenged the jurisdiction of the court to consider this request for relief under the ambit of this case. The federal government filed an amicus curiae brief raising the same contentions. On March 27, 1986, the court issued an order which held the court did have jurisdiction. This order also granted plaintiffs' motion to file a supplemental complaint to plead the cause of action for injunctive relief against the state. The state subsequently answered the supplemental complaint and named the

federal government as third-party defendant. The parties then filed cross motions for summary judgment and submitted the matter on the papers.

Can The State Recoup Payments Ordered By The Court?

The state argues that it is entitled- indeed required by the federal government - to recover the monies paid pursuant to this court's injunction because these funds constituted "over-payments" as that terms is used in 42 U.S.C. § 602(a)(22). The Supreme Court holding in Turner, supra., meant that plaintiffs could not exclude mandatory payroll deductions from their eligibility calculations and thus were not entitled to receive the funds ordered by this court. Since 42 U.S.C. §602(a)(22) requires states to "promptly take all necessary steps to correct any overpayment or underpayment of aid . . .", the state is forced to attempt to recoup the benefits to which plaintiffs were not entitled.

This court addressed this issue once

before in this case, although in a slightly different context. As the court said at the time, "[a] necessary premise of defendant's argument is that aid amounts restored by court order . . . constitute 'over-payments.' However, the legislative history accompanying [the statute] demonstrates that the 'overpayments' envisioned by Congress did not include aid amounts restored by court order." Turner v. Woods, 559 F.Supp. 603, 621, n.2 (N.D.Cal. 1982).

Plaintiffs claim this holding serves as the "law of the case" and binds the parties in this instance as well. See e.g. Moore v. Matthews, 682 F.2d 830, 832 (9th Cir. 1982). Defendants argue however, that the court's holding applied to court ordered payments resulting from constitutionally defective notices and is not the "law of the case" on that part of the action dealing with the mandatory payroll deductions. Defendants further argue that the recent Supreme Court decision in Atkins

v. Parker, 53 U.S.L.W. 4686 (June 4, 1985), calls into question the court's holding on the constitutionality of the notices and thus abrogates the binding effect of the court's holding. Although the court believes its prior ruling still does apply and subsequent events have not undermined its vitality, this issue is of important enough to deserve more explication than that given in a footnote in the court's prior opinion.[1]

This statute became law under Section 2318 of the Omnibus Budget Reconciliation Act of 1981(OBRA). Defendants argue the purpose of the Act was to reduce government spending and cut the federal deficit. Prior to the passage of the Act, the states

---

[1]/ Defendants assert the theory of "law of the case" is inapplicable here as they appealed this court's prior ruling and then settled the conflict before a ruling by the appellate court. Since the court has chosen to elucidate its prior ruling, it is not necessary to decide whether a holding which is appealed and then settled is nevertheless binding as the "law of the case."

had discretion over whether or not to collect "over-payments" made to recipients. Section 2318 removed this discretion and made collection of "overpayments" mandatory. As a result, the Department of Health and Human Services promulgated the regulation at 45 C.F.R. 233.20(a)(13)(i) which defines an "overpayment" as "a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible." This regulation also requires the state to recover "overpayments" from both current recipients and from individuals no longer receiving benefits.

Defendants assert that under this definition of "overpayments", the payments made pursuant to this court's order are subject to recovery under 42 U.S.C. § 602(a)(22). The federal government insists that since the Department assisted in preparing the OBRA amendments relative to

AFDC, the court should defer to the Department's interpretation of the statute. Miller v. Youakim, 404 U.S. 125, 144 (1979).

The court recognized that where Congress has not directly addressed the precise statutory question at issue, a court should give deference to a "reasonable interpretation" of that statute by the agency responsible for its implementation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., ___U.S.___, 104 S.Ct. 2778, 2781-82 (1984). However, as the Ninth Circuit reiterated in an opinion issued after Chevron, a court may reject an agency's interpretation of the statute if "there are compelling indications that it is wrong." Livermore v. Heckler, 743 F.2d 1396, 1404 (9th Cir. 1984)(quoting from Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367, 381 (1969). The court believes such compelling indications are present here.

It is true the main overall purpose of OBRA was to reduce government spending. See S.Rep. No. 97-139, 97th Cong., Ist Sess. 2-4, [hereinafter S.Rep.], reprinted in U.S.Code Cong. & Ad.News. 396, 397-98, [hereinafter Cong. & Ad.News.]; Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, 97 Stat. 357. Nevertheless, the legislative history of the Act also indicates the Congressional purpose behind enactment of Section 2318 was not - as urged by the federal third-party defendants (see federal government's Summary of Oral Argument, December 5, 1985, at p. 3) - to save as much money as possible by recovering all AFDC payments made in excess of the statutorily prescribed amount. The purpose of the amendment was to require states to recover "overpayments" resulting from recipient or agency error, even if the funds must come through a reduction in current AFDC benefit payments.

All available legislative history for

Section 2318 makes this Congressional purpose clear. Both the final Report of the Senate Finance Committee and the original committee Proposals for Reductions in Spending emphasize the twin goals of (1) encouraging recipients and state agencies to take greater responsibility to avoid "overpayments" and (2) recouping any such "overpayments" from current AFDC benefits if possible.

The final Report of the Senate Finance Committee expresses this purpose most forcefully. See S.Rep. at 520; Cong. & Ad.News. at 786. The Report first discusses the law in effect at the time, noting that "[s]tates are given the option of recouping overpayments, but are not required to do so." The Report then notes that even if a state does decide to try to recover an "overpayment,"

> "if an individual has no income or countable resources in excess of the AFDC payment, there can be no recovery of overpayments. There is one exception. Recoupment may be made when overpay-

> ments are caused by the recipient's willful withholding of information concerning his income, resources, or other relevant circumstances."

The Report next identifies the changes encompassed in the proposed amendment. States would no longer have the option of refraining from attempting to recover "overpayments." In addition, the new law would eliminate the prohibition on recovering overpayments from recipients whose only resource was their current AFDC payment. The states now would have the right to "offset the overpayment against the AFDC payment for which the individual continued to be eligible."

Finally, the Report explains the legislative purpose behind these amendments and states:

> "[t]he committee believes that a policy of insuring the correctness of payment is crucial if the AFDC program is to continue to have public support. By requiring the correction of both overpayments and underpayments, the committee believes that recipients and welfare agencies alike will be encouraged to take

> greater responsibility for assuring the accuracy of administration. Although States have been working to improve their administrative procedures and to reduce errors, the committee notes that [a significant percentage of cases still involve errors in payment]." (emphasis added)

This explicit language - which provides the only official legislative history for Section 2318 - firmly indicates that Congress' concern in amending the AFDC statute in 1981 was to strengthen administrative procedures for recovering excess payments made to recipients as a result of agency and recipient error. Earlier comments by the Senate Committee on Finance reinforce this conclusion. In the Proposals for Reductions in Spending Programs Under the Jurisdiction of the Senate Finance Committee issued three months before the passage of OBRA, the committee stated that:

> "[a] mandatory recovery policy would act as an incentive for recipients to keep the welfare agency informed about their situation, and require States to

> take responsibility for correcting underpayments." Senate Finance Comm. Print 97-5, at p. 41 (April 1981).

Nothing in this legislative history suggested Congress intended to require states to recover funds paid pursuant to a court-ordered injunction. In this action, the court determined plaintiffs were legally entitled to receiver higher benefit levels and ordered the state to provide these additional funds. Although the Supreme Court later overturned this court's order, this reversal only meant that this court reached a mistaken interpretation of the law. Payment of higher benefit levels during the pendency of this injunction did not constitute either recipient or agency error. "Neither recipients nor welfare agencies have the power to correct 'over-payments' resulting from court order." Turner v. Woods, supra. In the absence of any error or lack of diligence by either plaintiffs or the state, the OBRA amend-ments do not require - or empower - the

state to recover the funds paid under the injunction. Such recoupment would do nothing to "encourage[] . . . greater responsibility for assuring the accuracy of administration" of the AFDC program, S.Rpt., supra., and thus do not fall within the reach of Section 2318.

For these reasons, the court finds that payments made pursuant to an injunction which is subsequently reversed are not "overpayments" under 42 U.S.C. 602(a)(22) and defendants do not have statutory authority to recoup the payments made under this court's injunction.[2]

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[2]/ The parties also argued at length about the import of the actions of Washington State Department of Social and Health Services concerning recoupment of funds paid under a similar injunction. Plaintiffs contend these actions are relevant to the consistency of application of regulations by the Department of Health and Human Services. As this matter was raised for the first time at oral argument, and the parties were unable to give the court a full explanation about the arrangements between the state and the federal government, the court did not consider this evidence in reaching its decision.

Equitable Arguments

Although the federal government rests its argument solely on statutory grounds, the state defendants have also advanced equitable arguments in support of recoupment. The state raised these issues despite the fact that it intended to recoup these payments - as ordered by the federal government - under the statutory authority allegedly provided by 42 U.S.C. §602(a)(22). These equitable arguments are normally relevant only in the context of a state action for recovery for unjust enrichment or for damages resulting from an improperly issued injunction. However, the state has not brought such an action before this court; it raised these issues for the first time in response to plaintiffs' motion for injunctive relief. Nevertheless, in an effort to promote complete resolution of the issues before the court, the court is prepared to discuss the equities of the situation before it.

The state asserts the Supreme Court decision in Arkadelphia Co. v. St. Louis Ry. Co., 249 U.S. 134 (1919) should control the court's finding in this case. In Arkadelphia, a state railroad commission had established intrastate freight and passenger rates. The plaintiffs (two railroad companies subject to the tariffs) obtained a permanent injunction from the federal district courts enjoining enforcement of these rates. The Supreme Court reversed and ordered plaintiffs to restore the "excess" rates collected to the customers who had paid them. In so ruling, the court relied on the equitable principle that "a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby." 249 U.S. 145.

Although the court finds this language instructive, it does not believe it is

dispositive of the court's decision in this case. First, the case here is in a significantly different posture than was the matter before the Supreme Court. In Arkadelphia, the lower courts had required the entry of a bond upon the issuance of the preliminary injunction. When the injunction was made final, the courts ordered the bond released subject to "any changed conditions as to the facts, equities or rights that may hereafter take place or arise." 249 U.S. 139. When the Supreme Court reversed the injunction, the lower courts ordered the "excess" charges returned to those who had paid them and the Supreme Court affirmed using the language cited above. In this case, however, the court never required plaintiffs to enter a bond; as the Supreme Court reiterated recently, a party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond. W.R. Grace and Co. v.

Local Union 759, 461 U.S. 757, n.14 (1983).

Moreover, the language cited above from Arkadelphia does not state a per se rule of equity. The Supreme Court stated that this equitable principle was one that is "proper to be adopted in an equitable proceeding", 249 U.S. 145; the Court did not say it was the only principle of equity for a court to consider in like situations. As Justice Cardozo later stated for the Court, "[r]estitution is not of mere right. It is ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it . . ." Atlantic Coast Line Ry. Co. v. Florida, 295 U.S. 301, 310 (1935)(citations omitted). Thus, this court must consider all of the equities of the case in determining whether recoupment is appropriate.

The court finds the equities weigh in favor of plaintiffs. The affidavits submitted by plaintiffs indicate the severe

hardship that would be suffered by those plaintiffs who still receive AFDC benefits. There is some dispute between the parties about the amount of recoupment to be suffered by those plaintiffs who submitted affidavits. Regardless of which figures the court accepts, it is clear that many individual plaintiffs would be forced to endure for several months a ten percent reduction in their current subsistence level of income. As the affidavits demonstrate, the impact on individual families would be near catastrophic. Defendants argue that the severity of the results is a consequence of the "unreasonably high" rents these families pay. The court finds this explanation unpersuasive and unresponsive both to the realities of the housing market in the Bay Area and to the difficulties faced by families trying to survive on an AFDC income. There is no governmental interest in depriving class members of funds needed

to prevent eviction and malnutrition.

In response to these concerns, defendants assert that the government has paid out millions of dollars which it wishes to recover. Once again the parties dispute the amount of funds involved, but all agree that the sum is very substantial. Although the court is cognizant of the universal concern about the financial status of our governments, the court finds the harm that would be suffered by the government in the absence of recoupment is less severe than that to be suffered by individual plaintiffs should recoupment proceed. The government has already expended these funds and has weathered the difficulties caused by the issuance of the wrongful injunction. In contrast, plaintiffs' difficulties would begin with the recoupment and "it is extremely unlikely that AFDC recipients will have budgeted for the return of funds granted them by court order." Turner v. Woods, 559

F.Supp. at 621 (citing Goldberg v. Kelly, 397 U.S. 254, 266 (1970)).[3]

In addition, the court finds it relevant that plaintiffs brought the original action in good faith on a question of law which was in dispute. see Greenwood County v. Duke Power Co., 107 F.2d 484, 489 (4th Cir. 1939), cert. denied 309 U.S. 667 (1940). Defendants have suggested the court should order recoupment as a means of encouraging public interest lawyers to "think twice" about bringing class actions to expand the level of benefits received by

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[3]/ The parties have not submitted any evidence to the court to define the equities of attempting to recoup from plaintiffs who are no longer recipients of AFDC. As these individuals may now have significantly improved financial conditions, the equities may weigh differently in their situation. As this order prohibiting recoupment is based on the fact that the court ordered benefits were not "overpayments" under the statute, the court need not reach a determination on the balancing of the equities for these plaintiffs. The above discussion on the equities of recouping from current AFDC recipients is offered only as guidance to the parties should this matter come before the court once again.

their clients. The court believes this argument does not do credit to the government. It is the responsibility of attorneys to ensure their clients enjoy all of the rights and privileges granted by statute. It has been the court's experience that attorneys acting on behalf of clients receiving government assistance perform their roles with the same skills, integrity and good faith demonstrated by the most respected members of the legal profession. The suggestion that the court base its decision on a desire to discourage this part of the bar from bringing "law reform" suits is both inappropriate and unwarranted.

For the reasons stated above, the court finds the equities of the case do not justify recoupment of benefits paid to plaintiffs under this court's original injunction.

Conclusion

For all of the reasons articulated

above, and good cause appearing, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment is GRANTED. The motions for summary judgment of state defendants and federal third-party defendant are hereby DENIED.

2. The state defendants are hereby ENJOINED from terminating, suspending or reducing AFDC assistance grants to any AFDC recipient for the purpose of recouping benefits paid pursuant to this court's permanent injunction of July 29, 1982.

3. The state defendants are enjoined from representing to any class member, in any manner, that payments made under this court's permanent injunction constitute "overpayments" or that class members have a duty to repay benefits paid under this injunction.

4. The federal third-party defendant is enjoined from taking any action to declare that California is out of

conformity with federal law as a result of state defendants' compliance with the terms of this order.

IT IS SO ORDERED.

Dated: June 18, 1986

[Original Signed]
THELTON E. HENDERSON
UNITED STATED DISTRICT JUDGE

U.S. DISTRICT COURT

JUDGMENT

This action came on for hearing before the Court, Honorable Judge Thelton Henderson, United States District Judge, presiding, and the issues having been duly determined and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs' motions for summary judgment and injunctive relief are granted.

Dated at San Francisco, California this 18th day of June, 1986.

William L. Whittaker
Clerk of Court

BY: [Original Signed]
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SANDRA TURNER, et al.,	)	
	)	
Plaintiffs.	)	
	)	No. C 81-4457 TEH
v.	)	
	)	ORDER OF
LINDA MCMAHON, et al.,	)	CLARIFICATION
	)	
Defendants.	)	
	)	

Defendants have asked the Court to clarify certain language in its Order of June 18, 1986. After reviewing the papers originally submitted by counsel, the Court hereby deletes the language on page 13, lines 5 to 18, [App. 50, line 9 - App. 51, line 16] "Defendants . . . " and ending with " . . . unwarranted."

IT IS SO ORDERED.

Dated: August 27, 1986

[Original Signed]
THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Ninth Circuit

SANDRA TURNER, DEBRA SCRUGGS, et al.,	
Plaintiffs-Appellees,	86-2321)
vs.	No. 86-2490 DC CV 81-4457 TEH
OTIS R. BOWEN, etc.,	
Third-Party Defendant.	
SANDRA TURNER; DEBRA SCRUGGS; et al.	
Plaintiffs-Appellees,	
vs.	
OTIS R. BOWEN, etc.,	
Third-Party/Defendant-Appellant.	
and	
LINDA MCMAHON, etc.,	
Defendant-third-party/Plaintiff.	

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern

District of California and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed. Costs in this court in favor of the appellants' and against the appellees.

COST: U.S. DEPARTMENT OF JUSTICE

OPENING BRIEF	$122.20
REPLY BRIEF	41.60
SUPPLEMENTAL	20.80
EXCERPTS/RECORD	190.00
	$374.60
TOTAL.....	$374.60

Filed and entered October 16, 1987

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SANDRA TURNER, DEBRA SCRUGGS, and JERRYLEAN BAKER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California; DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; JESSE HUFF, individually and in his official capacity as Director of the Department of Finance of the State of California; and the DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA; Defendants/Third-Party Plaintiffs-Appellants, v. OTIS R. BOWEN, Secretary of Health and Human Services, Third-Party Defendant.	No. 86-2321 D.C. No. CV-81-4457-TEH

SANDRA TURNER; DEBRA SCRUGGS; JERRYLEAN BAKER, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellees,	)	
v.	)	
OTIS R. BOWEN, Secretary of Health and Human Services,	)	No. 86-2490 D.C. No. CV-81-4457-TEH
Third-party-Defendant-Appellant,	)	
v.	)	
LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California,	)	
Defendant-third-party-Plaintiff.	)	

SANDRA TURNER, DEBRA SCRUGGS, and JERRYLEAN BAKER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. OTIS R. BOWEN, Secretary of Health and Human Services, Third-Party Defendant, and LINDA MCMAHON, individually and in her official capacity as the Director of the Department of Social Services of the State of California; JESSE HUFF, individually and in his official capacity as Director of the Department of Finance of the State of California; and the DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA, Defendant-third-party-Plaintiff-Appellant.	No. 87-1519 D.C. No. CV-81-4457-TEH ORDER

Appeal from the
United States District Court
from the Northern District of California
(San Francisco)
Thelton E. Henderson,
District Judge, Presiding

Argued and submitted September 16, 1987

San Francisco, California
Filed: October 16, 1987

Before: CHOY, ALARCON, O'SCANNLAIN, Circuit Judges

The panel as constituted in the above case has unanimously voted to deny the petition for rehearing. Judge Choy recommended rejection of the suggestion for rehearing in banc Judges Alarcon and O'Scannlain have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED: February 22, 1988

42 U.S.C. §602(a) provides:

A state plan for aid and services to needy families with children must . . .

(22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan, and, in the case of-

(A) an overpayment to an individual who is a current recipient of such aid (including a current recipient whose overpayment occurred during a prior period of eligibility), recovery will be made by repayment by the individual or by reducing the amount of any future aid payable to the family of which he is a member, except that such recovery shall not result in the reduction of aid payable for any month, such that the aid, when added to such family's liquid resources and to its income (without application of paragraph (8)), is less than 90 percent of the amount payable under the State plan to a family of the

same composition with no other income (and, in the case of an individual to whom no payment is made for a month solely by reason of recovery of an overpayment, such individual shall be deemed to be a recipient of aid for such month);

(B) an overpayment to any individual who is no longer receiving aid under the plan, recovery shall be made by appropriate action under State law against the income or resources of the individual or the family; and

(C) an underpayment, the corrective payment shall be disregarded in determining its resources in the month the corrective payment is made and in the following month;

except that no recovery need be attempted or carried out under subparagraph (B) in any case, other than a case involving fraud on the part of the recipient, where (as determined by the State agency in accordance with criteria for determining cost-

effectiveness, and with dollar limitations, which shall be prescribed by the Secretary in regulations) the cost of recovery would equal or exceed the amount of the overpayment involved[.]

45 C.F.R. §233.20(a) provides:

(a) Requirements for State Plans. A State Plan for . . . AFDC . . . must, as specified below:

. . .

(13) Recovery of overpayments and correction of underpayments for AFDC.

(i) Specify uniform Statewide policies for recovery of overpayments of assistance, including overpayments resulting from assistance paid pending hearing decisions. Overpayment means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible. (The agency may deny assistance for the corresponding payment month rather than recover if the assistance unit was ineligible for the budget month, the State becomes aware of the ineligibility when the monthly report is submitted, the recipient accurately reported the budget month's income and other circumstances, and the

assistance unit will be eligible for the following payment month.)

(A) The State must take all reasonable steps necessary to promptly correct any overpayment.

(1) Any recovery of an overpayment to a current assistance unit, including a current assistance unit or recipient whose overpayment occurred during a prior period of eligibility, must be recovered through repayment (in part or in full) by the individual responsible for the overpayment or recovering the overpayment by reducing the amount of any aid payable to the assistance unit of which he or she is a member, or both.

(2) If recovery is made from the grant, such recovery shall result in the assistance unit retaining, for any payment month, from the combined aid, income and liquid resources, (without application of section 402(a)(8) of the Act) not less than 90 percent of the amount payable under the

State plan to a family of the same composition with no other income. When a State chooses to recover at a rate less than the maximum, it must recover promptly.

(B) The State shall recover an overpayment from (1) the assistance unit which was overpaid, or (2) any assistance unit of which a member of the overpaid assistance unit has subsequently become a member, or (3) any individual members of the overpaid assistance unit whether or not currently a recipient. If the State recovers from individuals who are no longer recipients, or from recipients who refuse to repay the overpayment from their income and resources, recovery shall be made by appropriate action under State law against the income or resources of those individuals.

(C) If through recovery, the amount payable to the assistance unit is reduced to zero, members of the assistance unit are still considered recipients of AFDC.

(D) In cases which have both an underpayment and an overpayment, the State may offset one against the other in correcting the payment.

(E) Prompt recovery of an overpayment: A State must take one of the following three actions by the end of the quarter following the quarter in which the overpayment is first identified:

(1) Recover the overpayment, (2) initiate action to locate and/or recover the overpayment from a former recipient, or (3) execute a monthly recovery agreement from a current recipient's grant or income/resources.

(ii) Specify uniform Statewide policies for prompt correction of any underpayments to current recipients and those who would be a current recipient if the error causing the underpayment had not occurred. Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which

is less than the amount for which the assistance unit was eligible, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment should have been issued. Under this requirement, for purposes of determining continued eligibility and amount of assistance, such retroactive corrective payments shall not be considered as income, or as a resource in the month paid nor in the next following month.

(iii) Paragraph (a)(13) of this section is effective for incorrect payments which are identified subsequent to September 30, 1981.

(iv) In locating former recipient who have outstanding overpayments the State should use appropriate data sources such as State unemployment insurance files, State Department of Revenue information from tax returns, State automobile registration, Bendex, and other files relating to current

or former recipients.

(v) the State must maintain information on the individual and total number and amount of overpayments identified and their disposition for current and former recipients.

(vi) The State may elect not to attempt recovery of an overpayment from an individual no longer receiving aid where the overpayment amount is less than $35. Where the overpayment amount owed by an individual no longer receiving aid is $35 or more, the State can determine when it is no longer cost-effective to continue overpayment recovery efforts, provided it has made reasonable efforts to recover the overpayment from the individual. Reasonable efforts must include notification of the amount of and reason for the overpayment and that repayment is required. States must also maintain information regarding uncollected overpayments as provided under paragraph (a)(13)(v) of this

section, to enable the State to recover those overpayments if the individual subsequently becomes a recipient. In cases involving fraud, States must make every effort to recover the overpayment, regardless of the amount.